

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-5001

UNITED STATES COURT OF APPEALS
For the Second Circuit.

In re

W. T. GRANT COMPANY,

Bankrupt.

LIEBMAN, EULAU, ROBINSON & PERLMAN,
ESQS.,

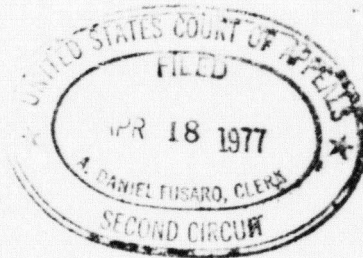
Appellant,

- against -

CHARLES G. RODMAN, as Trustee of the
Estate of W. T. Grant Company,
Bankrupt.

Appellee.

On Appeal from the United States District Court
for the Southern District of New York.



REPLY BRIEF FOR APPELLANT

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REPLY BRIEF OF APPELLANT

REPLY STATEMENT OF FACTS

This reply statement is submitted in response to

certain statements of facts appearing in Appellee's brief.*

Appellee argues that the orders of retention of November 14, 1975 and June 28, 1976 "establish the conditions under which [Liebman, Eulau] would be compensated for services rendered to Grant as a debtor-in-possession." (Appellee's brief, pp. 5-6). That contention is erroneous. Those orders do not deal with the services involved on this appeal. Both the November 14, 1975 and the June 28, 1976 orders, which were for future services, refer to the affidavits of Herbert Robinson sworn to November 6, 1975 and May 20, 1976, which accompanied the respective applications. In both affidavits, Mr. Robinson stated that Appellant would agree "to continue" to represent Grant. Furthermore, the November 6, 1975 affidavit expressly refers to services commencing November 6, 1975. The services for which compensation was sought in the application below were for the period from February 14, 1975 through and including October 1, 1975 (prior to the filing of the bankruptcy proceeding). Accordingly, contrary to Appellee's contention, the aforesaid orders of November 14, 1975 and June 28, 1976 do not establish the conditions under which Appellant would be compensated for services rendered to Grant for the period covered by the application below. That application did not seek compensation for any services rendered by Grant pursuant to each of the aforesaid orders.

* Appellant's statement of facts appears in Appellant's brief at pages 3-11.

Thus, there is no issue of a violation of the principle that a trustee may not contract to pay legal fees at a specified rate. (Cited at p. 6 of Appellee's brief.) Here, W.T. Grant Company ("Grant") had agreed to pay Appellant for legal services at Appellant's prevailing hourly rates prior to the filing of the petition for an arrangement. Thus, Appellant is entitled to be compensated for services rendered prior to the petition in accordance with its contract with Grant.

Moreover, in his description of the proceedings in the Bankruptcy Court, Appellee conspicuously omits a description of what occurred at the April 2, 1970 hearing. As set forth in Appellant's brief (pp. 8-11), neither the Court nor any party raised any issue as to the nature and extent of the services rendered by Appellant (A.37-56). No question was raised as to any duplication of services and Appellant was not called upon to submit any additional records of time expended and disbursements and expenses incurred in rendition of the professional services it performed in connection with these matters.* At the conclusion of the hearing in the Bankruptcy Court, the attorneys for the debtor and the official creditor's committee did not object to awarding Appellant the fees claimed and the Court granted Appellant's application. (A.56)

* Those records, which were and are available for inspection by the Court, establish that duplication, if any, was minimal.

POINT I

WHERE THERE WAS NO PROOF OF DUPLICATION OF SERVICES IN THE RECORD, THE BANKRUPTCY COURT'S FINDING OF SUCH DUPLICATION WAS CLEARLY ERRONEOUS AND ITS REDUCED AWARD OF COUNSEL FEES ON THE BASIS OF SUCH FINDING OF DUPLICATION WAS LESS THAN THE FAIR AND REASONABLE VALUE OF THE SERVICES RENDERED BY APPELLANT AND CONSTITUTED AN ABUSE OF DISCRETION.

Appellee argues that the existence or non-existence of a charging or retaining lien is immaterial inasmuch as the court must determine the value of the lien. Here Appellant's liens arose pursuant to New York Law. As established by the authority cited in Appellant's brief (pp. 17-18), Appellant's lien under New York law was determined by the sum Appellant was entitled to receive under its retainer agreement with Grant, which agreement was made prior to the filing of the petition for an arrangement.

Moreover, even assuming arguendo that the Bankruptcy Court was free to determine the reasonable amount of Appellant's lien, there was no evidence in the record below establishing that the amount sought by Appellant was unreasonable. The Bankruptcy Court reduced the fees awarded Appellant after making an unsupported finding of duplication of services. However, there is nothing in the record to support such a finding. The Bankruptcy Court incorrectly assumed the existence of duplication of services by counting the total number of hours expended by the individual attorneys in Appellant's firm

without knowing what each attorney did. The attorneys' time records which were maintained in the regular course of Appellant's business were available for the Court's inspection. No request for an actual inspection of these documents was made by any of the parties below or by the Court. The application below did contain a summary of the services rendered by Appellant (A.27-33) and a schedule showing the amount of hours expended by each of the attorneys and the paraprofessional in Appellant's office. (A. 33)

Since the issue of duplication of services was not raised below by any party or by the Court, Appellant was never afforded the opportunity to address the question which ultimately proved to be the basis upon which the Court reduced the fees awarded. It is a fundamental element of due process that a party be permitted the opportunity to respond to a claim which is made against its interest. Here no such claim was made. Thus Appellant never had the opportunity to show that there was in fact no duplication of services. The first mention of possible duplication was found in Judge Galgay's memorandum opinion issued more than one month after the date of the hearing.

Although there was no evidence in the record showing that the amount requested by Appellant was unreasonable, there was ample evidence to show that, on the contrary, that amount was indeed reasonable under the circumstances. First and foremost the amount sought was, with one notable exception, in accordance with Appellant's prevailing rates and time charges which Appellant charged to its other clients. As set forth in Appellant's brief (p.27), the rate charged by Herbert Robinson was \$25.00 an hour less than Mr. Robinson's prevailing charges during that year. As a result of that reduced rate, the amount sought by Appellant was \$2,886.25 less than its prevailing time charges.

That the amount requested by Appellant was indeed reasonable and that Appellant rendered its services efficiently and without duplication was further evidenced by the confirmation of Appellant as special counsel to the Trustee, subsequent to the decision of Judge Galgay below. In his application in support of an order authorizing Appellant's retention, filed on June 22, 1976, the Trustee stated: "By the continued retention of Liebman, Eulau the necessary legal services can be rendered at the least possible cost and with greatest efficiency." (A. 86)

In his brief, Appellee discusses some of the factors which are to be considered in determining the value of legal services and the quantum of compensation. Appellant does not

dispute these principles. However, the result reached by the Bankruptcy Court cannot be justified by reference to these principles, where no such issue had been raised below. Thus for example, Appellee states that one factor which is to be considered is the necessity for spending the time claimed (Appellee's brief, p. 12). However, neither any party nor the Court at any time, up to and including the hearing below, ever raised the question that Appellant had spent time unnecessarily.*

Another factor mentioned by Appellant is "whether the services actually conferred a clear, measurable benefit on the estate" (Appellee's brief, p. 12). In this case, Judge Galgay himself stated in his decision that he was "impressed with the results of the services rendered by [Appellant] insofar as W.T. Grant has received the combined benefit of \$230,000.00..." [A.78]. Nor was there any suggestion below that the nature and complexity of the services rendered justified a reduction in the fee sought by Appellant. In fact, as set forth in the affidavit of Allan J. Kirschner sworn to March 23, 1976 and submitted in support of the application below (A. 24-35) and the letter of Herbert Robinson dated May 19, 1976 (A. 80-81), the services rendered

* As stated Supra and at p. 13 of Appellant's brief, the Trustee's application for an order authorizing retention of Appellant, filed on June 22, 1976 supports the conclusion that Appellant had rendered services efficiently and at the least possible cost.

by Appellant involved fact gathering, legal research, negotiations with some of the defendants, preparation of responsive papers to motions directed against the complaint, and appearances in court, all of which required the rendition of sophisticated and skillful legal services.

Moreover, as set forth in Appellant's brief (pp. 27-28), there is no support in the record for the implicit conclusion of the Bankruptcy Court's decision that granting the application in the amount requested would have violated the principle of economy in the administration of bankruptcy cases. Appellee admits in his brief that "the primary factors which were considered by the Bankruptcy Court were the amount of time expended by Liebman, Eulau and the time fairly required to render the necessary professional services." (Appellee's brief p. 12). Appellee states that the Bankruptcy Court concluded that some of the time expended by Appellant "may have included duplication and overlapping of services"* (Emphasis supplied). Indeed the Court could not have definitively found duplication because there is nothing to support such conclusion in the record. Yet, the Court proceeded to reduce Appellant's fee based on the finding of duplication. In doing so, the Bankruptcy Court abused its discretion, and its action was clearly erroneous.

* Appellee's brief, p. 12

The instant case is distinguishable from In re Land Investors, Inc., 544 F. 2d 925 (7th Cir. 1976) (cited at pp 9-11 of Appellee's brief) where the court determined the extent of the attorneys' lien on a reasonable fee basis. In In re Land Investors, Inc. there had been an agreement by the bankrupt to a contingent fee, but there had been no agreement as to the precise extent of that fee. The court held that "there was no real alternative to determining a reasonable contingent fee." Id. at 932. The court in In re Land Investors, Inc. distinguished two earlier cases of this Court, In re Prudence Co., Inc., 96 F. 2d 157 (2d Cir. 1938) cert. denied sub. nom., McGrath v. Davison, 306 U.S. 616 (1938) and Sherman v. Buckley, 119 F. 2d 280 (2d Cir. 1941) cert. den. 314 U.S. 657 (1941) and the decision of the 5th Circuit in United States v. Transocean Air Lines, Inc., 356 F. 2d 702 (5th Cir. 1966) where specific contingent fee percentage agreements had been demonstrated and enforced. In the instant case, Appellant's agreement with Grant prior to the filing of the petition for an arrangement was that Appellant would be compensated in accordance with its prevailing hourly rates. Since that agreement was specific and the amount of compensation requested by Appellant in the application below was based upon this specific formulation, the application should have been granted in full.

The instant case is distinguishable from In re James Anthony & Co., 531 F. 2d 658 (2d Cir. 1976) (cited at p. 14 of Appellee's brief). As that decision notes after the District

Court had reviewed the original application and the Judge's report "it requested the Judge to review the application with a view to ascertaining duplication of effort, if any, and the scale of fees, as of the date the services were rendered..." Id. The decision reports that the Judge complied with this request which resulted after the hearings in an amended certificate wherein there was a general reduction from the \$335,000.00 allowed in the original certificate to some \$250,000.00. Accordingly, in In re James Anthony & Co., there was a hearing directly addressed to the issues which resulted in the reduction of the fees (i.e. duplication of services and the fees at the time the services were rendered). In the instant case, the hearing below did not concern itself with the issues upon which the Court apparently based the reduction, simply because none of the interested parties made any claim of duplication.

CONCLUSION

For all the foregoing reasons and the reasons set forth in Appellant's brief, Appellant respectfully requests that this Court reverse that portion of the order of the Bankruptcy Court entered in this proceeding on May 13, 1976 which denied Appellant's motion for an order permitting it to transfer to itself the sum of \$37,361.25 and which granted Appellant's motion only to the extent of permitting Appellant to transfer to itself the sum of \$26,671.70, and the orders of the District Court dated October 12, 1976 and November 29, 1976 which dismissed Appellant's appeal from that order and upheld that dismissal upon reargument, and upon such reversal, grant Appellant's application in full together with such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

LYNNETTE BRYANT, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 21 years of age and resides in Bronx, New York.

That on the 18th day of April, 1977, deponent served the within reply brief upon the following attorneys at their respective addresses:

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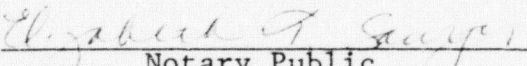
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Deponent deposited a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


LYNNETTE BRYANT

Sworn to before me this 18th
day of April, 1977


Notary Public

Notary Public
Commission Expires November 1979